142

No. (1)

Supreme Court, U.S.
FILED
09-463 OCT 13 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

Benoit Brookens,

Petitioner,

v.

Hilda L. Solis,
Secretary of Labor,

Respondent.

On Petition for a Writ of Certiorari
To the United Stated Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Benoit Brookens
460 Taylor Street, NE
Apt. G-44
Washington, DC 20017-4337
202/636-1695
Petitioner

QUESTION PRESENTED

Whether the U.S. Court of Appeals, denied the appellant the right to appeal pursuant to 28 U.S.C. 1291, when it summarily affirmed the decision of the district court, prior to its review, of any of the record in the trial court, or provide any consideration to any of the issues the appellant sought to raise on appeal?

This case presents the question whether a plaintiff, in a Title VII action under the Civil Rights Act of 1991, and Section 1981, is entitled to a trial, de novo, in the U.S. District Court and an opportunity for discovery?

Whether the circuit court's decision that Section 1981 of the Civil Rights Act, does not apply to federal employees is in error and conflicts with a holding of another federal circuit and the amended statute?

PARTIES TO THE PROCEEDING

Benoit Brookens, an international economist, at the U.S. Department of Labor with additional training in law, is the plaintiff in this Title VII action under the Civil Rights Act of 1991.

Hilda Solis, the successor to Elaine Chao as the Secretary of Labor, is the defendant.

TABLE OF CONTENTS

Page

Questions Presented i
Partied to the Proceedings ii
Table of Contents iii
Table of Authorities iv
Opinion and Judgment Below 1
Statement of Jurisdiction 1
Statutory and Constitutional
Provisions Involved 1
Statement of the Case 2
The Record Below 3
Reasons for Granting the Petition 3

The D.C. circuit has deviated beyond
the judicial norms of other circuits
which allow a hearing and discovery 3

There is a conflict among the circuits on
Section 1981 3

Appendix .....
Appendix
Table of Contents A-1

July 13, 2008 Order of
The Court of Appeals for the District
of Columbia Circuit, En Banc A-2

May 8, 2009 Order of the Court of
Appeals (panel) for the District of Columbia A-3

Applicable Constitutional Provisions,
Statutes, Rules
Civil Rights Act of 1964 ..... A-19

Section 1981 .....A-19
Court of Appeals Jurisdiction A-20

Pleadings and Evidence Below:

Relevant Docket Entries.....A-21

Plaintiffs' Exhibit 4 .....A-23

TABLE OF AUTHORITIES

Cases — Page

Federal

Anderson v. Liberty Lobby, Inc.,477 U.S. 242, 106 S. Ct. 2514, 91 L.Ed.2d 202 (1986).....6

Celotex Corp. v. Catrett, 477 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 202(1986);..6

City of Milwaukee v. Saxbe, 546 F.2d 693, (1976).....6

First Chicago Int'l v. United Exch. Co., 836 F.2d 1375,(1380)(D.C. Cir 1988) 4,6

Gaines v. Canada, 305 US 337, (S.C. Nov. 9, 1938), ...3

State

Gaines v. Canada , 342, Mo. 121,
113 S.W.2d 783, (Rev.)..... 3

Constitutional Provision

U.S. Const. Amend. XIV (Equal Protection
Clause).....passim

Statutes
28 USC 1291, Court of Appeals
Jurisdiction.....3
Title VII, Civil Rights Act on 1964,
.....3
Section 1981, Civil Rights Act of 1991,
.....3

Petition for a Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia.

Opinion and Judgment Below

The district Court's opinion is unofficially reported at _____, and reprinted in Appendix A-5. The court of Appeals unpublished order is unofficially reported at ___ and reprinted in Petitioner's Appendix, A-3.

Statement of Jurisdiction

The District Court has jurisdiction under 28 U.S.C. Art. 1331. The Court of Appeals issued its judgment on July 13, 2009. This Court has jurisdiction under 28 U.S.C. Art. 1254(1).

Statutory and Constitutional Provisions Involved

Relevant provision of Title VII of the Civil Rights Act of 1964, is provided in the Appendix at A-18.

Section 1981, as amended by the Civil Rights Act of 1991, is provided in the Appendix at A-18.

28 U.S.C. 1291provides for de novo judicial review in the U.S. Court of Appeals. The section is provided in the Appendix at A-19.

Statement of the Case

Benoit Brookens filed a civil action alleging intentional discrimination in the award of promotions in vacancies, promotions through desk audits, and details to training assignments leading to promotions. Mr. Brookens cited, comparator co-employee, (CR) who, was a GS-11 in 2001, and was promoted annually to GS-15, in 2006, while Mr. Brookens remained in Grade as a GS-12 since joining the U.S. Department of Labor in 1990.

Among Mr. Brookens' allegations, Amended Complaint, the Labor Department failed to properly evaluate his university level teaching [and other] experience, to qualify at the GS-14 level, as was the practice at other federal agencies. (Attachment 4, Appendix A-22).

In lieu of an Answer to the Complaint, DOL filed a motion to Dismiss and in the Alternative for Summary Judgment under FRCP 12(b)(6).

The district court, [decision, p.4, A-8], was not persuaded, under FRCP 12(b)(6), that "the case can be dismissed on timeliness grounds, failure to state a claim, or collateral estoppels."

The district court, however, rather that providing an opportunity for the defendant to file an Answer to the Complaint and provide the parties a period for discovery, the district court decided the agency's motion for summary judgment finding that

the plaintiff failed to "raise any genuine issues of fact," [district court decision, p.4,A-8].

Mr. Brookens filed an appeal, and prior to receipt of the record, the pleadings, or any documentary evidence, in the case, the court of appeals granted the Agency's motion to Summarily Affirm the decision of the District Court. A panel of the Court of Appeals ruled that "the merits of the parties' positions are so clear as to warrant summary action. (Decision, May 8, 2009) (Appendix, A-3).

The Court of Appeal, en banc, on July 13, 2009, affirmed. (Appendix, A-2)

The Record Below

The district court record, Docket Sheet (Appendix, A-22) shows that the record is devoid of any Answer to the Complaint, filed by DOL, or any discovery, authorized by the parties. The trial court, in its decision, states that the Plaintiff was denied "additional" discovery, when, in fact, the plaintiff nor the defendant, conducted any discovery in the proceeding.

The trial court cites and relies on the justifications the Agency provides to Mr. Brookens for denying him the requested personnel actions. Thoses "legitimate, non-discriminatory reasons" [Dist. Ct. decision, p. 5, A-9] are the very justifications Mr. Brookens is challenging de novo in the district count.

Plaintiffs are Entitled to a De Novo Review Under Title VII, (Civil Rights), and to Discovery in the District Court.

Parties, in Title VII actions of the Civil Rights act of 1964, are provided, by statute, a de novo hearing, in discrimination cases before the U.S. District Court. The Court of Appeals, upon petition, by either party, takes a de novo review of the district court's decision, 28 U.S.C 1291. Without the exercise of the proper oversight responsibility by the circuit court, the entire administrative review process for the enforcement of domestic civil rights and antidiscrimination laws and the American justice system, on this critical issue of our social policy, breaks-down[1].

The Circuit Court Failed its Oversight Responsibility to Support the Decision with Evidence from the Record or to Provide an Opportunity for Trial Court Discovery in All Circuits

The issues, identified in this petition, were presented to the court of appeals. However, that court's decisions, by the panel, nor en banc, identifies

---

[1] Gaines v. Canada, 305 US 337, (S.C. Nov. 9, 1938), "A Quiet Hero of Civil Rights History, Vanished in 1939—NYTimes.com", "A Supreme Triumph, Then Into the Shadows," by David Stout, July 12, 2009, [www.nytimes.com/2009/07/09us/12gaines.html]" In 2006, Mr. Gaines was posthumously admitted to the University of Missouri Law School and the Missouri Bar. The U.S. Supreme Court granted review of the Missouri supreme court decision which held that Mr. Gaines failed to exhaust his administrative remedies.

or cites any of the arguments—or the evidence, in its decisions, for review by this court.

The review of those issues, thusly, is now requested before this court on certiorari.

The Court of Appeals, without a cursory examination of the record, as reflected in its decision, A-3, summarily affirmed the decision of the district court, A-5—without any regard to the issues the petitioner desired considered for review.

The district court, in general, recognizes the need for, and authority permitting the parties to conduct discovery in Title VII civil rights and discrimination actions. Generally, the evidence, documents, and witnesses, generally are in the hands of the defendant. That recognition was provided by the district court in this case.

"While summary judgment ordinarily 'is proper only after the plaintiff has been given adequate time for discovery," the district court wrote, [decision, p. 10] "*First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375,(1380)(D.C. Cir 1988) the information Brookens seeks through discovery is simply not necessary to decide this case."

Brookens provided to the district court, exhibit 4, [A-22] for example, an action by another federal agency, "The Executive Office of the President," certifying Mr. Brookens as eligible for a GS-14 vacancy, consistent with the relief requested in the complaint from DOL. This evidence-- in the trial court record-- was not reviewed nor considered by the

Court of Appeals. Although DOL provided witness statements contrary to the allegations by Mr. Brookens--in the Complaint--those statement were also contrary to the actions of other federal agencies on the same "delegate examination" applicant certification process which qualified Mr. Brookens for a similar vacancy.

The Court of Appeals—did not consider Mr. Brookens' formulation of this or any other of the issues Mr. Brookens raised in the appeal. Whether the appellant—is represented—or unrepresented—at any stage of the administrative or judicial process, the petitioner should be entitled to present to the appeals court his formulation of the factual and legal errors in any of the proceeding's below.

This was not permitted by the circuit court. That failure of the circuit court--and an error of due process—is now before this court in this petition.

The Supreme Court, has "discretionary" oversight responsibility for the circuit courts and, reportedly, will exercise that authority [2]based on a number of factors, including case load, national significance and impact upon the country, and perhaps, the proper application of the law and the efficient and fair operation of the judiciary.

However, the Circuit court has the "statutory and Constitution" oversight responsibility for the operation of the district courts and for providing oversight for the federal administrative agencies. In

[2] Applicable to approximately 7,000 annual certiorari filings.

this case, the Circuit court failed to properly exercise its required de novo review of Mr. Brookens' appeal.

The trial court summarily dismissed the plaintiff's "retaliation" claim,[decision, p. 10] when it found that "no jury could infer that Brookens' non-selection was retaliatory because Brookens has failed to rebut "the Secretary's legitimate non-discriminatory reasons for not selecting him for the position."

Without the requested discovery, Mr. Brookens clearly will be unable to produce other documents, as Exhibit 4, (App. ____) to refute those challenged explanations. The circuit has sanctioned this departure from the course of the accepted and usual proceedings in Title VII actions.

Mr. Brookens requests that this case be remanded to the circuit court for briefing on the merits of each of the issues of Mr. Brookens. Without Mr. Brookens' identification of the issues of the appeal, the circuit is failing to perform both its statutory and Constitutional, de novo, review responsibilities—in Title VII, Civil Rights Actions.

In First Chicago International, relied upon by the district court, we find an enunciation of the principals required of all U.S. courts:

> More fundamentally, under Federal Rules of Civil Procedure, when a Rule 12(b)(6) motion to dismiss is converted into a motion for summary judgment, all parties must be given a "reasonable opportunity all material made pertinent to such a motion by Rule 56.

Furthermore, it is settled that the term "reasonable opportunity" includes the opportunity to 'pursue reasonable discovery." See e.g. Celotex Corp. v. Catrett, 477 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 202(1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2514, 91 L.Ed.2d 202 (1986) (plaintiff must have "a full opportunity to conduct discovery");

The court of appeal deviated from the judicial norms established by this court when it accepted that denial of the plaintiff's right to discovery in this Title VII suit.

Amended Section 1981 Provides Enhanced Federal Employee Protections for "Intentional Discrimination."

Finally, the D.C. circuit decision, on the application of Section 1981, conflicts with the holding of another circuit on the applicability of Section 1981 to the Federal Government. The City of Milwaukee v. Saxbe, 546 F.2d 693, (1976), and amendments to the Civil Rights Act or 1991, 42 U.S.C. Art. 1991 provides enhanced protections to federal employees for "intentional discrimination" as Mr. Brookens alleges here.

For these reasons, the court is requested to grant certiorari for this petition.

Respectfully submitted,

Benoit Brookens
460 Taylor Street, NE
Apt. G-44
Washington, DC 20017-4337
202/636-1695